

345.1
M76A-42
SM 981 4 M

IRRIGATION LAW

OF THE

STATE OF MONTANA

THE CAREY ACT

Report of Arid Land Commission

AND

RECOMMENDATIONS OF GOVERNOR SMITH RE-
GARDING IRRIGATION.

Helena Public Library: —

HELENA, MONTANA:
STATE PUBLISHING COMPANY,
STATE PRINTERS AND BINDERS,
1897.

IRRIGATION LAW

OF THE

STATE OF MONTANA

THE CAREY ACT

Report of Arid Land Commission

AND

RECOMMENDATIONS OF GOVERNOR SMITH RE-
GARDING IRRIGATION.

HELENA, MONTANA:
STATE PUBLISHING COMPANY,
STATE PRINTERS AND BINDERS,
1897.

THE CAREY ACT.

REPORT OF ARID LAND COMMISSION AND RECOMMENDATION OF THE GOVERNOR REGARDING IRRIGATION.

In the year 1894, Congress passed an Act donating to the State of Montana, upon certain conditions one million acres of the Arid Lands of the United States within the boundaries of said State. A full text of this Act is quoted in the opinion of the Court hereinafter set forth.

By Act of March 18th, 1895, the State of Montana duly accepted said grant, and provided a detailed method of carrying the Act of Congress into effect, so that the State might receive the full benefit thereof. This Act is as follows:

CAREY ACT.

Sec. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled "An Act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the Act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant

and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this Act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said states shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation shall be held as a trust fund for and be applied to the

reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars.

Approved, August 18, 1894.

CAREY ACT AMENDED.

An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30th, 1897, and for other Purposes.

AMENDING THE CAREY ACT.

That under any law heretofore or hereafter enacted by any State, providing for the reclamation of Arid Lands, in pursuance and acceptance of the terms of the grant made in Section 4 of an Act, entitled "An Act making appropriations for the Sundry Civil Expenses of the Government for the fiscal year ending June 30th, 1895," approved August 18th, 1894, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such state without regard to settlement or cultivation.

Provided, That in no event, in no contingency and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

Approved June 11th, 1896.

MONTANA STATE ARID LAND ACT ACCEPTING THE CONDITIONS AND PROVISIONS OF THE CAREY ACT.

HOUSE BILL NO. 89.

AN ACT

Making provision for the acceptance and reclamation of one million acres of land, offered as a grant by the United States, to each of the Arid Land States, by and through an Act of Congress, approved August 18, 1894, and the appointment of a commission to direct and supervise such reclamation.

Whereas, The Congress of the United States has by the terms of an Act, approved August 18, 1894, entitled "An Act making appropriations for Sundry Civil Expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," provided for the donation to the public land States of not exceeding one million acres of desert land to each of such States, upon the reclamation of said land in the form and manner in said act provided, free of cost for survey or price; and,

Whereas, It is impossible for the State of Montana to avail itself of the terms of said act of Congress by the direct appropriation of moneys for such purpose, because of the restrictions of the Constitution of said State relative to the maximum indebtedness of said State; and,

Whereas, It is the desire of the State of Montana to avail itself of the benefits of said Act of Congress and acquire the lands therein offered; Now, therefore, Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That for the purpose of enabling the State to accept the offer of the United States, made in the above recited Act, and for the purpose of reclaiming the lands therein men-

tioned in accordance with the terms of said act, a commission shall be and is hereby created, under the name of the State Arid Land Grant Commission, which shall consist of five (5) members, and they and their successors shall remain and continue to be such commission for all the purposes hereinafter provided.

Sec. 2. The Governor shall appoint five commissioners, all residents and citizens of the State of Montana, each of whom shall hold office for the period of six years from the date of his appointment and until his successor is appointed and has qualified. At the expiration of their respective terms, or in case of a vacancy for any cause, the Governor shall again appoint, so that said commission shall at all times be a full board of five. In the event of a failure of any of said persons to qualify under such appointment within twenty days after receiving notice of such appointment, it shall be the duty of the Governor to appoint another person to serve in his place, and the Governor shall so continue to appoint until the commission shall consist of five members. Each commissioner before entering upon the duties of his office shall take an oath to well and properly discharge the duties of the trust hereby created and thereto attendant for the best interests of the public, which oath shall be reduced to writing, subscribed by the person making the same, and filed in the office of the Secretary of State. Said board shall be non-partisan, and not more than three members shall be appointed from one political party.

Sec. 3. Immediately after the said commission shall be constituted as aforesaid, a meeting thereof, to be called by the Governor of the State, shall be held at the City of Helena. Said commission shall organize by electing one of their number chairman; and they shall also choose a secretary, who shall not necessarily be one of their number, and who shall hold his office until his successor is appointed. They shall choose an engineer, who shall hold his office until his successor is appointed. All officers elected and agents appointed by said commission shall be subject to removal at the pleasure of said commission. Said commission shall keep a complete record of all its proceedings, which shall be open at all times to the inspection of the public. Each of said commis-

sioners shall receive as compensation for their respective services six dollars per diem while actually performing the duties of their office, and also actual traveling expenses, necessarily incurred in the performance of their duties. The accounts of said commissioners, together with all and singular the actual expenses of said commission, shall be presented, passed upon and paid in the same manner as provided by law for the auditing and payment of other accounts against the State.

The said commission shall have full power and authority by resolution to enact such rules for its government and the carrying into effect of this act as to them may seem just and reasonable, and not inconsistent with law; they shall also have power to determine the duties and fix the compensation of all their officers, employees, agents and others acting under them, and the Commissioners and employees shall receive their compensation in warrants drawn upon the fund hereinafter provided.

Sec. 4. The said commission shall have full power and authority to take all steps necessary to comply with all and singular the conditions of said Act of Congress, to the end that the State may receive the full benefit and advantage accruing to it from and by the terms of said Act of Congress.

They shall have and are hereby given full power to prepare and file a map of the land proposed to be irrigated and reclaimed by the State, which shall exhibit a plan showing the mode of the contemplated irrigation and the source of water to be used for such irrigation and reclamation; and this shall be done as often as the said commission may proceed with the reclamation of any separate or several tracts or parcels of land; to contract with any person or persons, corporation or corporations, as in their judgment seems best, for the entire expense of reclaiming any portion of the land so donated by the government to the State, at a price not to exceed eight dollars per acre, for all land reclaimed; Provided, however, that no liability or indebtedness is created against the State by, under or through said contracts. That said commission shall provide for the payment of the expense of such reclamation under such contract or contracts by the issuance of warrants

to the person or persons, corporation or corporations undertaking such work, for the full amount of said contract price, which said warrants shall be issued by said commission under the signature of the chairman and secretary thereof from time to time, upon estimates made by the engineer; Provided, that no estimate shall be called for and no warrants issued on estimates until such contractor or contractors has or have completed at least four miles of canals or ditch, or has or have done such amount of work upon reservoirs or other improvements as in the opinion of the commission would be of sufficient value for the purpose intended, to warrant a payment thereon and then only eighty-five per cent. (85 per cent) of the estimate so made. Said warrants shall be dated the day of their issue, and shall bear interest at the rate of six per cent. (6 per cent.) per annum until paid; they shall be registered by the treasurer of the State of Montana upon presentation by the holders thereof in the order in which they are presented for such registration. That it shall be provided in and by said contract or contracts that said commission shall retain fifteen per cent. (15 per cent.) of all estimates made by the engineer upon work done upon said contracts, until the full and final completion of the contract, and upon the receipt by said commission of the certificate of said engineer that said work has been fully completed according to contract, said commission shall issue warrants to the full amount full power to make any such restriction or provision in any of said contracts, for the better protection of the interests of the State, as in their judgment they may deem proper.

Sec. 5. Said commission shall select all lands that have been donated to the State of Montana by the Act of Congress aforesaid, and shall from time to time make all necessary contracts in behalf of this State with the Secretary of the Interior of the United States, as contemplated by said Act of Congress. Said commission shall provide for the settlement by and the sale of such lands to actual settlers, and may make such contracts as are necessary to cause such settlements and sales to be made, and may issue such pamphlets, circulars and printed matter, advertising said land and other resources of the State as may be deemed proper, to the end that they may procure actual settlers upon the lands thus reclaimed.

Sec. 6. The title to all lands thus reclaimed shall pass directly to the State of Montana by patent from the Government of the United States, in accordance with such rules and regulations as may be prescribed by the Secretary of the Interior.

Sec. 7. Each contract shall be kept separate from all other contracts, and the warrants issued under each contract shall refer in such way to such contract as to clearly connect the same, and all warrants shall be and they are hereby made a charge against and a lien upon the land reclaimed under and by virtue of said contract, and upon the water rights connected therewith, and upon the entire plant and improvements for the face value of said warrant, together with the interest thereon. No warrant, however, shall be a charge or lien upon any land except that reclaimed under the particular contract upon which said warrant is issued. The fund received from sales of land reclaimed under each contract shall be kept separate and shall only be paid upon the warrants issued upon the contract under which said lands have been reclaimed.

Sec. 2. In case of sales of lands to actual settlers, such commission shall have power and they are hereby directed to receive in payment therefor warrants issued for construction under the contracts herein mentioned, at their face value, together with accrued interest thereon at the rate of six per cent. (6 per cent.) per annum.

Sec. 9. After the segregation of all lands selected in any particular locality to be reclaimed under the terms and condition of any contract entered into for that purpose, the commission shall assess upon each forty acre tract or fraction thereof, the equitable proportion it shall bear to the total cost of the reclamation of said district, with twenty per cent, (20 per cent.) of such portion added, and none of said land shall be sold for less than this sum, together with interest on such appraisal (exclusive of the added per cent.) at the rate of six per cent. (6 per cent.) per annum from the date of the first warrant issued under the contract under which the specific land is reclaimed; said commission shall issue to actual settlers certificate of selection at the price so established, which certificate shall contain the conditions of sale of the land and the use of water through the water systems for the cultivation

of the same; Provided, however, that the water right shall be appurtenant to and inseparable from the land so selected; upon full payment being made by the purchasers said lien and charge of said warrants against said specific land shall cease and be determined and the State shall issue its patent therefor, as in the case of other State lands.

Sec. 10. In case it shall be necessary for said commission in order to carry out the purposes of this act and to carry into effect any contract made by it for the reclamation of lands, to condemn any right of way or land for any purpose connected with such reclamation, the said commission shall have and it is hereby given the right to exercise the power of eminent domain, in the manner provided by the statutes of this State relative to the exercise of eminent domain generally; Provided, that whenever it becomes necessary for said Commissioners to exercise the right of eminent domain, for the purpose of acquiring any property or easement in execution of this Act, or whenever said Commissioners shall deem it necessary to purchase any right of way, easement or property in connection with execution hereof, it shall be lawful for said Commissioner to make, execute and deliver warrants on the said Federal Grant Reclamation Fund herein established, for the purpose of securing lawful money of the United States wherewith to pay for such property so condemned or acquired by purchase, provided, that it shall be the duty of the Secretary of said Board of Commissioners to keep separate accounts with each contract, and to charge under each of said contracts and the land reclaimed thereunder, as near as may be practicable, the expense properly incurred by through or in connection therewith; Provided, that nothing in this act shall interfere with any prior or vested water rights.

Sec. 11. Said commission shall appropriate all waters necessary for the carrying into effect of this act, in the same manner as appropriations are required by law to be made in behalf of individuals, save and except that all of said appropriations shall be made in the same and on behalf of the State of Montana.

Sec. 12. No land reclaimed under the provisions of this acts shall be sold to any except actual settlers and only in par-

cels of not exceeding 160 acres to each settler. In case any lands thus reclaimed are in the actual occupancy of any person at the date of the filing of the map with the Secretary of the Interior, as provided in said act of Congress, such settler shall have the preference right of selection to an extent not exceeding 160 acres, upon the same terms and conditions, however, as other selections are made.

Sec. 13. All lands reclaimed under the provisions of this Act and others shall at all times be subject to an annual water tax or toll to be fixed and collected by said commission under such rules and regulations as it may from time to time prescribe; Provided, however, that the maximum tax or toll shall not exceed the actual cost of maintaining and operating said works, and pay the proportionate share of the expenses of said commission; Provided, that if said commissioners dispose of water to others than purchasers of the aforesaid reclaimed lands, such sales shall be made at such reasonable prices and under such regulations as such commission may from time to time prescribe.

Sec. 14. That State Treasurer shall open an account with a certain fund to be known and designated as the Federal Grant Reclamation Fund, to which said fund shall be paid all moneys received from the sale, rental or other disposition of any of the lands reclaimed under the aforesaid act of Congress or from the sale, rental or other disposition of waters diverted or appropriated in pursuance of the provision of this act; and no payment shall be made from such fund for any purpose whatever, nor shall any part or portion of such fund be made to the credit of any other fund, but the said fund shall be and it is hereby dedicated especially to the redemption of warrants and interests accrued and to accrue under and in pursuance of the provisions of this act; and whenever any sum in excess of Five Hundred Dollars (\$500.00) shall have accumulated in said fund, when warrants against the same are outstanding, it shall be the duty of the State Treasurer to call in and pay outstanding warrants and accumulated interest thereon, in the order of the registration of such warrants, to the extent that such accumulation may enable said State Treasurer to redeem the same. And when

so redeemed said warrants shall be marked on the face thereof and on the books of the State Treasurer as paid and cancelled. And interest shall cease on all warrants on the day of payment or within thirty days after the first publication of a call for the redemption thereof.

Sec. 15. That when any warrant or warrants, shall have been received in payment for land it shall be the duty of the Chairman or Secretary of the Board of Commissioners to enter upon the books of said Commissioners, and to likewise mark upon the face of the surrendered warrant, the following entry, to-wit: Received in payment for land and cancelled this the.....day of.....18..., and when such shall be redeemed in cash they shall be marked "Paid in current funds."

Sec. 16. Out of the surplus arising out of the sale of said lands shall be first deducted the amounts of money paid out by the State under this Act. The remainder thereof shall be used by the State in reclaiming other arid lands of the State.

Sec. 17. Said commission shall on or before the first day of December of each year make a written or printed report to the Governor of all their acts during the preceding year.

Sec. 18. There is hereby appropriated out of the funds of the State not otherwise appropriated, the sum of one thousand dollars per year for the years 1895 and 1896 for the use of said commission, in carrying this act into effect.

Sec. 19. All laws and acts inconsistent with this act are hereby repealed.

Sec. 20. This act is hereby declared to be a public act and shall take effect and be in full force from and after its passage.

Approved 10:50 A. M., March 18, 1895.

THE MONTANA SUPREME COURT DECLARES THE MONTANA ACT CONSTITUTIONAL.

Subsequently, questions as to the constitutionality of this Act of the Legislature of Montana were suggested, and the Attorney-General of the State advised the State Treasurer to refuse to register a warrant provided for by said Act and issued in accordance with its terms.

For the purpose of determining the constitutionality of this Act, the commissioners provided for therein applied to the Supreme Court of the State of Montana for a mandamus to compel the State Treasurer to register this warrant.

After a full argument before the Supreme Court upon every proposition raised against its constitutionality, the Supreme Court rendered its opinion sustaining the Act in the following language:

No.

STATE OF MONTANA

IN THE SUPREME COURT

DECEMBER TERM 1895

STATE OF MONTANA EX REL.

J. T. ARMINGTON,

Plaintiff.

vs.

FRED. W. WRIGHT, TREASURER,
OF THE STATE OF MONTANA.

Defendant.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE OPINION.

This a proceeding against Wright as State Treasurer to compel him to register a warrant drawn by the Arid Land Commission. Relator's petition alleges the appointment of the Arid Land Commission pursuant to the act of the Legislature approved March 18, 1895, concerning State Arid Lands, Section 3530 *et seq.* Political Code. He also alleges the qualification of the members and the organization of the Board, and that he was present at a certain meeting and was entitled

to compensation fixed by the statute for two days services; that the Commission audited the claim and issued and delivered to relator a warrant; that he presented the warrant to the State Treasurer who refused to register it.

The State Treasurer does not deny any of the aforesaid allegations, but pleads by way of avoidance, that the claim of relator was a claim and account incurred by the Arid Land Commission and should have been presented to the State Board of Examiners, and upon approval by it, should have been transmitted to the State Auditor who should have drawn a warrant and transmitted it to the State Treasurer in the mode and manner provided by section 3532 of the Political Code, and that the Arid Land Commission had no authority to draw relator's warrant and the State Treasurer no authority to register it. That the only reasons why the Treasurer refused to register said warrant were:

(A) That said account had not been passed upon, audited and approved by the State Board of Examiners of the State of Montana.

(B) That the Auditor of the State of Montana had not drawn his warrant therefor, and that the said respondent had no authority to register the same, as such an act, and all thereof, would be in violation of Section 34, Article 5 of the Constitution.

(C) That the Legislature of the State of Montana had made no appropriation for the payment of said claims, and that no taxes had been levied for such purpose.

To this answer relator demurred on the ground that it did not state facts sufficient to constitute a defense.

OPINION OF THE COURT BY HUNT, J.

The first point involved is, was relator's claim one which must have been submitted to the State Board of Examiners? If the claim upon which the relator's warrant was issued is not a claim against the State, or is the compensation of an officer fixed by law, then under the decision of this Court in *State ex rel Bickford vs. A. B. Cook, Auditor, ante p. . . .*, the State Board of Examiners has no authority to pass upon the same.

Congress by the Act of August 18, 1894, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," authorized the Secretary of the Interior, with the approval of the President, to contract and agree to patent to the States of Washington, Montana, or any other States, as provided in the act, in which may be found desert lands, not to exceed 1,000,000 acres of such lands to each State under certain conditions. The act provides as follows:

"Sec. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled 'An Act to provide for the sale of desert land in certain States and Territories,' approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and

plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars."

The Legislature of the State, for the purpose of enabling the State to accept the offer of the United States made in the Act of Congress, passed the State Arid Lands law under which relator claims his compensation. This Statute of the State provides for the appointment of five State Arid Land Grant Commissioners who shall constitute a Commission. Each Commissioner shall hold office for six (6) years from date of his appointment, and shall take an oath of office. The Commission is obliged to organize and is clothed with power to choose a secretary and an engineer. It has full power and authority to take all steps necessary to comply with all and singular the conditions of the said Act of Congress to the end

that the State may receive the full benefits and advantages accruing to it from and by the Congressional Act. It is also expressly provided that each Commissioner shall receive as compensation for his services six dollars *per diem* while actually performing his official duties, and also actual travelling expenses actually incurred in the performance of his duties.

The Commissioners shall receive their compensation in warrants drawn upon the fund "hereinafter created," and the accounts of the Commissioners together with all and singular the actual expenses of said commission, shall be presented, passed upon and paid in the same manner as provided by law for the auditing and payment of other accounts against the State."

The powers of the Commission are extensive. It may *inter alia* contract for the entire expenses of reclaiming any portion of the land donated by Congress at a price not to exceed Eight (8) Dollars per acre for all land reclaimed, with this express *proviso*, however, "that no liability or indebtedness is created against the State by, under or through said contracts." Provision is made for the expenses of such reclamation by issuing warrants to the contractor for the full amount of the contract price, less fifteen (15) per cent of all estimates made by the engineer. The relator's powers, duties tenure and emoluments make him an officer of the State with compensation fixed by law. His *per diem* is therefore not the subject of examination by the State Board of Examiners.

Bickford vs. Cook, Auditor, *supra*.

Further examination of the law confirms this opinion. Provision is made for the sales of the lands to actual settlers. The moneys realized from such sales shall go into what the law denominates the "Federal Grant Reclamation Fund."

No payment can be made from this fund for any purpose whatever and no part of said fund can be credited to any other fund—it is especially dedicated to the redemption of warrants and interests accrued and to accrue under the Arid Lands Act of the Legislature.

There is, throughout the entire State law referred to, no mention of any warrants other than those in favor of the Commissioners and the employes and contractors; nor is there

any mention of any fund except the "Federal Grant Reclamation Fund." It follows therefore, that the compensation of the Commissioners shall be paid by warrants on this fund and from it exclusively.

The law under consideration, like the Capitol Commission bill already considered by the Court (*Bickford vs. Cook*, Auditor, (*supra*) has created the special fund named in its provisions for the purpose of enabling the State to accept the beneficial offer of the United States.

The fund created by the law is pledged for the payment of all outstanding warrants to be issued against it under the provisions of the act. No holder of any warrant can claim against the State. He may look alone to the fund established and to the custodians of that fund and other agents of the State to do their respective duties under the Act.

There are two classes of expenses of the Commission, one including the compensation of the Commissioners and their employes; another embracing the actual travelling and other expenses of the Commission. Relator admits that the latter class includes office rent, stationery and other incidental expenses and concedes that these must be presented to the State Board of Examiners, inasmuch as the Legislature has appropriated One Thousand (1,000) Dollars for the years 1895 and 1896 for the use of the Commission in carrying the Act into effect. There being a special provision including actual expenses of the Commission as accounts against the State, such expenses must be presented to the Board of Examiners as other claims against the State.

Sec. 3594, Political Code.

The clauses providing for the reimbursement to the State of all payments made out of this One Thousand (1,000) Dollars appropriated, are evidently to protect the State for its outlay in inaugurating the public irrigation scheme. And to the extent only of this One Thousand (1,000) Dollars for incidental expenses of the Commission in carrying the Act into effect, may there be any liability on the part of the State.

Eventually this sum repaid will belong to the State entirely subject to State control. Sec. 3545.

2d. The Attorney General next suggests that if the Treas-

urer registered the relator's warrant, he would violate the Constitutional provision prohibiting him to pay out of the Treasury any money except appropriations made by law and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt. Sec. 34, Art. V, Constitution.

Eliminating from the case the appropriation of One Thousand (1,000) Dollars heretofore referred to, we regard this Federal Grant Reclamation fund as impressed with a trust under the Act of Congress. The State cannot make it a fund of its own, to be dealt with as may be State funds contemplated by the Constitution. No control can be exercised over it beyond such as is consistent with the Act of Congress in the execution of the trust, which is to aid the State in the reclamation of desert lands and the settlement, cultivation and sale thereof into small tracts to actual settlers. The power of the State is limited to the acceptance of the offer of the United States and the execution of the trust assumed by the acceptance thereof. The officers of the State are but agents designated by the law of the State to carry out the Legislative will. They do not (except in the disbursement of the One Thousand (1,000) Dollars in legitimate claims against such appropriation for limited purposes) act in any capacity other than as agents to carry out the offer of Congress through the Enabling Act of the State.

It is to be observed that the United States limits the State in its right of sale or disposal of the quantity of land to any one person, and expressly requires any surplus of money derived by any State from the sale of the said lands in excess of their cost of reclamation to be held in trust fund to be applied to the reclamation of other desert lands. The trust relationship must continue over the funds. The Treasurer, therefore is not prevented by the Constitutional clause cited, which has reference to State Bonds, from registering the relator's warrants as required by law, without regard to any action being had by the Auditor or the State Board of Examiners.

3rd. It matters not that the Legislature has made no appropriation for the payment of claims such as relator's in this case, and has not levied any taxes to meet the same. Having

decided that there can be no State debt created to pay the warrants, there can be neither a levy of taxes, nor an appropriation of State funds made to pay them.

From our opinion upon these several propositions, the relator is entitled to have the warrant issued to him registered by the Treasurer, unless the law requiring to register is in itself unconstitutional.

The validity of the statute has been ably discussed by counsel for relator, although it was not seriously questioned by the Attorney General.

We are satisfied that the law is valid. The United States had the power to make the offer to the State, to grant it the lands provided the State would reclaim them. Of this there can be no doubt. Now if the State could accept the offer of the United States at all, it could only act through its legislature in the exercise of power requisite to making its acceptance effective. That it has attempted to accept the offer is expressed by the first section of the law of 1895 which recites "that for the purpose of enabling the State to accept the offer of the United States * * * and for the purpose of reclaiming the lands * * * in accordance with the terms of said Act (of Congress) a commission shall be and is hereby created under the name of the State Arid Land Commission" etc., etc.

We know of no constitutional limitation forbidding the legislature of the State from receiving the benefits of Congress by way of this offer, where it is especially provided in the law of acceptance that no debts and liabilities, other than for limited incidental expenses of the Commission can ever accrue to the State under its provisions. We believe the acceptance was valid.

The Legislature having accepted the offer, its next right in the premises was to provide a detailed method whereby the State could execute that acceptance and make it operative. This they have done. The attitude of the State thereby became that of an agent of the United States, to make effective the offer of the latter to part with its desert lands to the State or its assigns, provided the State can reclaim such lands and induce the actual settlement and cultivation thereof. This

the State has undertaken to make possible by Legislation. If the State fails, the United States will not issue its patents; if the State succeeds the United States has agreed to pass the title to the State or its assigns, upon satisfactory proofs of the fulfilments of the requirements of the Act of Congress. The very conditions precedent to the right of the State to obtain patents—reclamation, settlement, cultivation—include those which will thereafter divest the State of its title. Under any conditions the State only holds the legal title for the benefit of real owners, actual settlers upon the land, irrigating and cultivating the same. The benefit to the State lies in the advantages of having such actual farmers.

The provisions of Article XVII of the Constitution to the effect that all lands in the State that have been, or that hereafter be granted to the State by Congress, shall be public lands and shall be held in trust for the people to be disposed of as hereafter provided for the respective purposes for which they have been or may be granted, are not applicable to the lands which the United States proposes to part with under the Act of Congress already referred to.

We think that the learned counsel for the relator is correct when he says that the provisions of the State Constitution relate only to such lands as the State has acquired or may acquire title to after the same are selected under laws provided for that purpose. But under this Congressional Act, no title is passed to the State or its assigns, until after the land has been reclaimed in the manner provided by the law. *Rice vs. Minn. & N. W. R. R. Co.*, 1 Black 358.

The State has the power to make contracts with individuals or corporations for the placing of water upon the land and may make contracts to sell with actual settlers to cultivate at least twenty acres on each one hundred and sixty acre tract. The State may thus earn this land for the benefit of its settlers, providing it complies with the requirements of the acts of Congress, but until it does so earn it, there is no transfer of title, and the State is expressly limited in its control and use of the land.

The State can never dispose of the lands in the manner provided by the Constitution and laws of the State relative to lands generally.

At the time of the adoption of the Constitution, it could scarcely have been contemplated that the United States would ever authorize the State to accept such a trust as that offered by the provisions of this somewhat unusual, but generous law of Congress, and accepted by the State. We therefore cannot believe that any sections of the Constitution which are generally applicable to lands where the title may vest in the State by grant *in praesenti* and which are wholly incompatible with the execution of this trust, apply to this offer and to such lands as may be reclaimed by settlers under the methods provided for carrying the offer into effect.

It follows that the respondent having failed to give any sufficient reason for not registering relator's warrant the demurrer to his answer is sustained, and the writs will issue.

(Signed) WILLIAM H. HUNT,
Associate Justice.

We concur,

(Signed) W. Y. PEMBERTON,
Chief Justice.

(Signed) WILLIAM H. DeWITT,
Associate Justice.

REPORT OF ARID LAND GRANT COMMISSION.

Helena, Montana, January 11, 1897.

To His Excellency, GOVERNOR R. B. SMITH,

Your Arid Land Grant Commission, beg leave to submit the following report of their work during the year 1896.

In strict accordance with the law creating this Commission, our annual report should have been made to the outgoing Governor on December 1st, but in view of the fact that the work intrusted to us is of such great importance to the State, and feeling that it may be the wish of your Excellency to send the Legislature some special message regarding your views upon the future Legislation needed, for the better carrying out the work of reclaiming our Arid Lands, we have delayed sending in our second annual report until the present time.

On account of various defects in our State Law, your Commission has from the first met with many discouragements, but we are nevertheless very sanguine that with the amendment of our State Laws in such a way as to enable us to issue securities which will meet the demands of investors, the work may be at once begun, and carried forward to a successful completion.

In the early part of our work, feeling that the Carey Act was defective in its provisions, we called certain defects in the law to the attention of the Hon. Secretary of the Interior, and the Hon. Commissioner of the General Land Office, who recommended to Congress, that the bill be amended, which was done, and an amendment was passed being approved on June 11th, 1896, and we have no hesitancy in saying that with proper amendments to our State Arid Land Law, Montana will derive very great benefit from this Carey Act.

We attach to this report a copy of the amendment passed as above mentioned.

Feeling that it was of great importance to have the Supreme Court pass upon the Constitutionality of our Montana Law, we caused a warrant to be drawn, and presented to the State Treasurer, and demanded that he register the same, as contemplated by the law; which demand he resisted under the direction of Hon. H. J. Haskell, Attorney General of the State.

The Commissioners authorized the employment of Hon. John B. Clayberg to represent the Commission on the action, with the result that the Supreme Court sustained the demand of the Commission and declared the Act constitutional on every point raised.

The Commission finding that it was not possible to accomplish the work intrusted to it without some change in the laws of the State, has been very careful in its expenditures, that no indebtedness might be incurred by the State.

We submit herewith a statement showing amount of money expended, and warrants drawn as provided by law.

The members of this Commission are satisfied that the matter of Irrigation is of the very greatest importance to the State of Montana at the present time, that we may in the near future

receive our share of the desirable immigration, which will in the coming two or three years be turned in the direction of the great Northwest, and we hope that the subject will receive the most full discussion by the present Legislature, and that a bill may be drawn that will meet with the requirements of investors, and make it possible to raise funds for carrying on the work.

We believe that in passing such a bill, great care should be exercised, that all possible safe-guards may be thrown around the interests of the people, and that the duties of the Commission shall be most clearly and emphatically defined in no uncertain language.

FINANCIAL REPORT.

Total Appropriation by the Fourth Legislative Assembly	\$2,000.00
Expenses of Commission for traveling expenses, Stationery, Stenographer, etc., etc.	665.54
Balance of unexpended Appropriation	\$1,334.46

WARRANTS DRAWN UPON THE ARID LAND GRANT RECLAMATION FUND.

For Per Diem of Members	\$ 618.00
For expenses of Surveys	1,540.90
	<hr/>
	\$2,158.90

Of warrants drawn in favor of Geo. Scheetz for survey as above \$1,540.90, Twelve Hundred Dollars have been paid by the members of the Commission, and all warrants in favor of the members of the Commission for per diem, are still in the hands of the Commissioners, in whose favor drawn.

Respectfully submitted,

E. W. BEATTIE,

Chairman of the State Arid Land Grant Commission.

RECOMMENDATIONS OF GOVERNOR SMITH IN HIS FIRST MESSAGE TO THE LEGISLATURE.

Some legislation is absolutely necessary to enable us to secure the benefits of the "Carey Arid Land Act." The policy of issuing script is in my opinion very unwise and unsatisfactory. The rate of interest is higher than is necessary when bonds are issued; and as I say with reference to the Capitol Building, bonds are preferable to script issues in the money markets. The present law was enacted by the Legislature prior to the amendment of the Carey act, by Congress, and is defective in some respects. Something must be done to remedy and correct the errors made in the legislation, looking to the real reclamation of our Arid Lands.

I am fully convinced that the Arid Land Commission is one, that if properly directed may be of vast importance to our State, but if improperly managed or controlled, it may become the hot-bed of unwholesome jobs to the discredit of our commonwealth. Carefully consider and enact into law the proper benefit intended by the Congressional Enactment.

